SUPREME COURT, U.S.
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No. 97-42

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

EASTERN ENTERPRISES,
Petitioner,

v.

APFEL, COMMISSIONER OF SOCIAL SECURITY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* ON BEHALF OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE* [1]

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest is interested in this case because the First Circuit correctly held that imposition of liability for retiree health benefit premiums

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[1] Counsel for all parties have consented to the filing of this *amicus* brief, and *amicus* has filed those consents with the Clerk of Court. Sup. Ct. R. 37.3. As required by Supreme Court Rule 37.6, *amicus curiae* Midwest Motor Express, Inc. states that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

pursuant to the provisions of the Coal Industry Retiree Health Benefit Act ("Coal Act") violates neither the constitutional guarantee of substantive due process nor the constitutional prohibition of uncompensated takings. Midwest has been assessed withdrawal liability pursuant to the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendment Act of 1980 ("MPPAA") regarding an alleged withdrawal from the Central States Southeast and Southwest Areas Pension Fund ("Central States") which was wholly involuntary in character, in contrast with the facts of this case in which Eastern Enterprises incurred liability through voluntary actions on its part.

Midwest believes that this case does not fall within the ambit of Justice O'Connor's concerns expressed in her concurring opinions in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) ("*Connolly*") and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993) ("*Concrete Pipe*"), despite Petitioner's reliance on those opinions. By contrast, Midwest's case squarely raises the precise concerns identified by Justice O'Connor. Midwest is interested in the briefing and argument of this case to ensure that Petitioner's challenge to the Coal Act does not serve as a vehicle for disposing of the issues raised by Justice O'Connor's concurrences in an inapposite case.

Midwest was deemed to have withdrawn from the Central States Fund as a result of its employees' successful effort to have their collective bargaining agent, various local unions affiliated with the International Brotherhood of Teamsters, decertified pursuant to the provisions of the National Labor Relations Act. An arbitrator ruled that Midwest's withdrawal under these circumstances was involuntary, in that Midwest, as an employer was barred from taking any part in the decertification process and, in fact, abstained from any such involvement.

Petitioner has argued that inter alia, Justice O'Connor's concurrences provide a sound constitutional rationale for reversing the First Circuit's decision. Midwest disagrees, in that Petitioner's conduct in this case does provide a rational basis for the imputation of liability for continuing contributions on behalf of retired miners. In light of this, the instant case should not serve as a vehicle for a more general examination of the concerns expressed by Justice O'Connor in *Connolly* and *Concrete Pipe*.

SUMMARY OF ARGUMENT

In *Connolly*, Justice O'Connor expressed in a concurring opinion her view that a constitutional imposition of retroactive liability on an employer must rest on some basis in the employer's conduct that makes it rational for employees to expect that the employer is responsible for providing their benefits in the future. Petitioner's argument to the contrary notwithstanding, this case does not implicate Justice O'Connor's concerns. In her concurrence in *Connolly*, Justice O'Connor noted that the case implicating her concerns had not yet been before the Court. Likewise, in *Concrete Pipe*, Justice O'Connor's concurring opinion noted that her concerns with retroactive legislation expressed first in *Connolly* were once again not implicated. Midwest wishes to establish before this Court that, despite Petitioner's arguments to the contrary, this case does not fairly present the concerns articulated by Justice O'Connor, either. Accordingly, the Court should address the principles articulated in Justice O'Connor's concurrences narrowly, if at all.

ARGUMENT

In *Connolly v. PBGC*, 475 U.S. 211 (1986), the Court was presented with a challenge to the constitutionality of the MPPAA. The Court upheld the constitutionality of that statute, but Justice O'Connor, concurring separately, stated several concerns to which Petitioner herein directs

the Court's attention, despite the fact that the facts of this case do not create the concerns identified by Justice O'Connor. The crux of Justice O'Connor's concurrence in *Connolly* is that

> In my view, imposition of this type of retroactive liability on employers, to be constitutional, must rest on some basis in the employer's conduct that would make it rational to treat the employees' expectation of benefits as the employer's responsibility.

Connolly, 475 U.S. at 229. Petitioner Eastern Enterprises argues that in this case there was no employer conduct of the sort identified by Justice O'Connor that would make the retirees look to Eastern Enterprises as a future source of insurance premiums to be made on their behalf. The First Circuit and the district court both found to the contrary in their decisions below. Under the Coal Act, signing of a collective bargaining agreement with the United Mine Workers of America ("UMWA") is sufficient conduct to bring an employer within its obligation to pay health insurance premiums for its former employees. Under Justice O'Connor's concurrences in both *Connolly* and *Concrete Pipe* signing a collective bargaining agreement is sufficient employer conduct to make imposition of the Coal Act's obligations on an employer constitutional.

By signing collective bargaining agreements, Eastern, and other employers became participants in the scheme which provided miners working under those contracts, and their families, with an increasingly comprehensive and wide-ranging system of health care during their active working lives and thereafter. Moreover, as noted in the First Circuit's opinion, the high degree of government involvement in the coal mining industry from the late 1940s onward, coupled with the implied promises of lifetime benefits contained in wage agreements made the obligations imposed on employers by the Coal Act a foreseeable risk of signing a wage agreement with the United Mine Workers. In signing the wage agreements, Eastern helped

to establish and perpetuate a benefit system upon which miners, former miners and their families relied for provision of health insurance. Eastern joined the system and, having joined, it is rational, in constitutional terms, for Congress, acting in the interests of former employees related to Eastern in some way to look to Eastern to help reform the system when it became unsupportable.

What distinguishes Eastern Enterprises and other coal industry employers burdened by the Coal Act from the as-yet unidentified employer about whom Justice O'Connor expressed her concerns in *Connolly* and *Concrete Pipe* is that the triggering mechanism for liability under the Coal Act is an *action* taken by the employer. Eastern would not be in the situation it now finds itself in had it not signed a wage agreement with the UMWA. Similarly, the employers in *Connolly* and *Concrete Pipe* would not have been assessed with withdrawal liability had they refrained from participation in a multiemployer pension plan or, having joined, not withdrawn from the plan.

Midwest, however, presents an entirely different factual and legal context. MPPAA imposes liability upon employers who withdraw from multiemployer pension plans. To the extent that an employer takes some action to withdraw from a pension plan, e.g. dissolving its business, this Court has found that imposition of withdrawal liability under MPPAA is constitutional. The definition of withdrawal contained in MPPAA is not restricted to withdrawals caused by an employer's actions, however. An employer is deemed to have withdrawn from a pension plan if it permanently ceases operations, 29 U.S.C. § 1383(a)(2), clearly the result of an action by the employer, or if it "ceases to have an obligation to contribute under the plan," 29 U.S.C. § 1383(a)(1), which event need not be the result of an action by the employer. It is one subset of the passive type of withdrawal, what Midwest has called an "involuntary withdrawal", that squarely presents the problems foreseen by Justice O'Connor in her concur-

rences in *Connolly* and *Concete Pipe*. It is possible for an employer covered by MPPAA to be assessed withdrawal liability based on the actions of other parties completely unrelated to the employer and contrary to the desires and best interests of the employer. Midwest is an example of precisely this type of withdrawal.

Midwest has been assessed for payment of withdrawal liability as a result of no action of its own but, rather, as a result of the actions of its employees acting without the cooperation of Midwest to decertify their union, an event which precipitated a finding that Midwest had withdrawn from the multiemployer pension plan to which it had been contributing on behalf of its employees. In 1991, Midwest began collective bargaining with the Teamsters local unions representing its employees with the object of getting a contract that would allow it to be more competitive. As part of its final collective bargaining offer, Midwest proposed that it would continue to participate in the multiemployer pension plan to which it had been contributing for many years on behalf of its employees. Midwest's employees, however, during a protracted strike determined that their interests would best be served by decertifying their union and doing without union representation. As required by the National Labor Relations Act, the employees took the steps necessary to achieve decertification without any assistance or encouragement from Midwest. In fact, had there been any participation by Midwest in the process, the National Labor Relations Board would not have allowed the decertification election to occur and if the assistance had been discovered after the election, the NLRB would not have allowed the decertification result to stand. Ultimately, the election occurred and the union was decertified. Within weeks of the certification of the election result by the NLRB, the multiemployer pension plan notified Midwest that Midwest had withdrawn from the plan and owed withdrawal liability on account of the employees' decertification. In sum, Midwest was assessed

withdrawal liability as a result of actions which it could not, and did not, initiate, promote, control or further in any way. Unlike the present case, Midwest's liability is based on behavior which is not its own, which it was forbidden by law from influencing.

Notwithstanding its protestations to the contrary, Eastern Enterprises has taken an action—signing a collective bargaining agreement with the UMWA—which is the basis for the liability it is contesting in this action. While the temporal remoteness of that action by Eastern Enterprises and other factors inherent in the Coal Act's statutory scheme may make the Coal Act unconstitutional as applied to certain employers, the Coal Act does not implicate the concerns raised by Justice O'Connor in her concurrences in *Connolly* and *Concrete Pipe*.

CONCLUSION

For the foregoing reasons, the Court should not apply the analysis proposed by Justice O'Connor in her concurrences in *Connolly* and *Concrete Pipe* to the facts in this case as that analysis is inapposite here. In the alternative, the Court should apply Justice O'Connor's narrowly, in light of the employer action taken by Eastern Enterprises upon which its liability under the Coal Act is based.

Respectfully submitted,

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